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No. 171

In the

Supreme Court of the United States

OCTOBER TERM, 19

EVANS PRODUCTION CORPORATION,
Petitioner,

v.

DON J. SHAW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—RI 1-6711

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DON J. SHAW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Evans Production Corporation, Petitioner herein prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case.

OPINIONS BELOW

The case was commenced as No. 6973 Civil in the United States District Court for the Northern District of Texas, Dallas Division, and no opinion was written by the District Judge. The opinion of the Court of Appeals, carried

under Cause No. 17,931, (R. 442) is reported in 276 F. 2d 313. The opinion of the Court of Appeals on Petition for Rehearing (R. 510) is not reported at this writing.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1), to review the judgment in the Court of Appeals dated March 30, 1960. Rehearing was denied in the captioned case by opinion dated May 20, 1960. Under date of June 1, 1960, the issuance of mandate of the Court of Appeals was stayed for a period of sixty (60) days and until final disposition of the case by the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether or not a party in a civil jury case has failed to preserve his right to object to the charge given by the Court where the record shows that such party presented to the Court five additional requested instructions and the record shows that such requested additional instructions were discussed by the Court with counsel for both parties, and, thereafter, refused by the trial judge, and where such requested instructions clearly show the asserted deficiency and error in the Court's charge.

2. Whether or not a trial court may, in a case involving the construction of a written agreement, submit to a jury over objection a special interrogatory upon which there has been no evidence offered by either side, other than the written agreement itself.

3. Whether or not a trial court may, in a case involving the construction of a written agreement, submit to a jury over objection a special interrogatory with respect to which evidence is uncontroverted.

RULES INVOLVED

RULE 46, Federal Rules of Civil Procedure.

RULE 51, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This is a suit by the Respondent (Plaintiff in the District Court) against Petitioner (Defendant in the District Court) based on a letter agreement dated May 28, 1953, executed by the parties to the suit, seeking a money judgment against Petitioner. The issue in the case is the interpretation of the said letter agreement, which is hereinafter set out in full in Appendix A.

Respondent had originally been employed by the Petitioner as a Vice President and Manager of Petitioner's operations under an earlier letter agreement dated June 26, 1951, which called for Respondent's full time work for Petitioner, provided for a salary of $1,000.00 a month, traveling expenses, automobile, and which, in general, was a simple employment contract. Respondent proceeded to pursue his employment under this agreement, beginning on June 26, 1951, or shortly thereafter. From time to time, Respondent requested Petitioner to revise his employment arrangement to include a carried interest or other participation in oil production and reserves of the

Petitioner. Petitioner refused to make this type of arrangement, but on May 28, 1953, Respondent and Petitioner executed a letter agreement providing for purchase by the Respondent of 483 shares of common stock of Petitioner, with Petitioner furnishing the funds to Respondent for the purchase; it was provided that the stock itself would be the only collateral. This letter also contained certain repurchase provisions which have resulted in this lawsuit. The letter agreement was similar to incentive stock agreements which the principal officer of the Petitioner, T. M. Evans, had made with other key employees of the H. K. Porter Company, another organization of which he was the principal officer. It was modified, however, to attempt to show, in the repurchase provisions, a value for oil reserves, which are not ordinarily shown by normal accounting procedure on the financial statements of oil companies. This was done by adding to the Petitioner's commitment to repurchase the stock at book value, as shown by the annual statement next preceding, the clause "plus a value of fifty cents a barrel for proven oil reserves of the company." The basic dispute in the lawsuit is whether the value of fifty cents a barrel for proven oil reserves of the company is to be added one hundred per cent to the otherwise book value of the Respondent's stock, or whether Respondent was to receive only a pro rata share, based on his proportion of stock ownership of the value of fifty cents a barrel for the proven oil reserves of the company.

Trial of the case was had to a jury and at the close of the Respondent's evidence, Petitioner moved for judgment (R. 361). Likewise, at the close of all the evidence, Petitioner moved for judgment (R. 363). Both motions were denied by the District Court and the cause was submitted to the jury on two special interrogatories. One of these interrogatories related to whether or not the parties intended that Respondent was to receive a pro rata portion based on his stock ownership (R. 296); the second interrogatory related to the date of computation of the oil reserve figures, specifically whether or not the parties intended to be at the close of the fiscal year or on the day of demand. (R. 297.) With respect to the first issue, the evidence of what the parties said and did was uncontroverted; the only dispute was the basic issue in the lawsuit—what was the intention of the parties, but with respect to the facts testified to, there was no dispute. There was no showing that the parties ever discussed the precise question which was litigated. As a matter of fact, the evidence showed that the letter of May 28, 1953, was written in Pittsburgh, signed by T. M. Evans, for Petitioner, mailed to Dallas, and signed by Respondent without any comment, and returned to Evans' office. With respect to the second issue submitted to the jury, there was absolutely no evidence at all. Nevertheless, over specific objection contained in the motions above referred to, the District Court submitted the case to the jury on these two interrogatories.

Since counsel for Petitioner was unsuccessful in persuading the District Judge that the case should not be submitted to the jury, he submitted five requested instructions. (R. 366-370.) The requested instructions were considerably fuller than the Court's proposed charge, which was extremely brief with respect to the rules of the construction of written instruments. Only one of their requested instructions (Special Instruction No. Four) was perhaps covered by the Court's charge. The record of the case shows that there was "Discussion off the record." (R. 280.) After which the District Judge said:

> "All right. Just make this: The Defendant's requested special charges were by the Court overruled except to the extent that such charged are embraced within the charge and issues submitted by the Court in its charge. You can just put that little notation on all of them.
>
> "(Recess had.)" (R. 280.)

The jury returned answers to the interrogatories submitted as were in line with Respondent's contentions in the case and judgment was entered for the sum of $452,596.03; Supersedeas bond in the amount of $475,000.00 was filed and an appeal taken to the Court of Appeals for the Fifth Circuit.

Upon appeal, the Court of Appeals held that the Petitioner had failed to preserve the right to object to the jury charge. The case was further affirmed as to having been properly submitted to a jury. The decision of the District

Court was reversed with respect to the cross-appeal of the Respondent regarding the allowance of interest from date of first demand. As modified in accordance with Respondent's appeal, the decision of the District Court was affirmed.

SPECIFICATIONS OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the Petitioner waived his objections to the charge submitted to the jury and therefore could not on appeal complain of the charge or the refusal of the requested instructions. (Specifications of Error numbers 4, 5, 6, and 7 to the Court of Appeals.)

(2) In holding that it was proper to submit to the jury an interrogatory upon which no evidence was introduced. (Specifications of Error numbers 1, 2, and 3 to the Court of Appeals.)

(3) In holding that it was proper to submit to the jury a question upon which the evidence was uncontroverted. (Specifications of Error numbers 1, 2, and 3 to the Court of Appeals.)

(4) In holding that affirmance of the jury answer to one of two special interrogatories automatically precludes the appellant from complaining of the answer to a totally different question presented by the second interrogatory.

REASONS FOR GRANTING THE WRIT

I. Under Specification of Error (1).

In its specifications to the Court of Appeals below, the Petitioner complained of the Trial Court refusing to give its requested special instruction 1, 2, 3, and 5.

These requested instructions, as indicated earlier in this petition, were requested in writing before the jury retired and were discussed by the District Judge with counsel for both parties and were thereafter marked refused except insofar as included within the Court's previously prepared charge.

As indicated above, the Court of Appeals denied any consideration of these requested instructions in the following language:

> "Here, Evans has failed to preserve any objections to the district court's instructions. See *Maryland Casualty Co. v. Reid, 5 Cir., 1935, 76 F. 2d 30, 33.*" (R. 453.)

Rule 51, *Federal Rules of Civil Procedure* governing objections to the charge, reads as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he

> objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

This decision is in conflict with *Swinney v. United Feature Syndicate, Inc. (C. C. A. 2, 1942), 129 F. 2d 904,* and with *Williams v. Powers (C. C. A. 2, 1943), 135 F. 2d 1935.* These cases hold that the purpose of Rule 51, requiring objection to the charge, is simply to apprise the Trial Judge, before the jury retires, that the complaining party is not satisfied with the charge and to prevent a party from remaining silent until the jury has retired and then claim inadequacy and error in the charge. This is a fair and proper holding. Professor Moore *(Vol. 5 of Moore's Federal Practice, page 2505, paragraph 51.04)* states this in the following language:

> "The rule does not require formality, and it is not important in what form an objection is made or even that a formal objection is made at all, *as long as it is clear that the trial judge understood the party's position; the purpose of the rule is to inform the trial judge of possible errors* so that he may have an opportunity to correct them."

The Court of Appeals in the instant case did not attempt to distinguish any of the above cases or authorities and the holding here is in direct conflict with these cases and places a complaining party in the position of not only having to submit written requested instructions, but if they are refused, to stand up in Court and make some formal statement in the record to a judge who is already adequately

informed of the alleged deficiency or error in the charge. The holding of the Court of Appeals in this case is further in conflict with the wording of Rule 46, *Federal Rules of Civil Procedure*, which makes formal exceptions to rulings or orders of the Court unnecessary, it being required only that the party make known to the Court what action he desires the Court to take.

II. Under Specifications of Error (2), (3) and (4).

The decision of the Court of Appeals in this case with respect to the second, third and fourth specifications of error above set out, is in direct conflict with applicable decisions of this Court and of the courts of the State of Texas to such an extreme and the decision so far sanctions a departure by the District Court of the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision. The fundamental division between the function of judge and jury was not observed and the District Court permitted the jury to engage in the construction of a written instrument. It was indicated by the District Judge at pretrial that he would submit two questions to the jury. A trial was had, and with respect to the first question, there was no contradictory evidence concerning the facts and circumstances surrounding the execution of the written instrument in question. Counsel for the Respondent in his argument to the jury virtually admitted that the agreement was in the letter of May 28, 1953, and that there was no conflict in the evidence, in the following words: "The best evidence is

what they put in black and white, and they did that on May 28, 1953, after considering this thing carefully over a period of months * * * *Their intentions are in that written instrument.*" (R. 291.) As to the second interrogatory, there was no evidence offered by either side to explain on what date the reserves were to be computed. Nevertheless, over objection, the District Judge let the case go to the jury. This is a fundamental departure from proper judicial proceedings, and injustice and an unreasonable and inequitable interpretation of the agreement before the Court resulted. While the more historic and profound questions may be those concerning Federal constitutional and statutory problems, the great volume of business in the Federal District Courts in civil matters of this type is of extreme day-to-day importance and departures of this fundamental nature should be reviewed by this Court. The decisions of the District Court and the Court of Appeals below are in conflict with applicable decisions of this Court in *Levy v. Gadsby, 3 Cranch, 180, 186, 2 L. Ed. 404, 406; Walker v. Bank of Washington, 3 How 62, 72, 11 L. Ed. 494, 499; Iasigi v. Brown, 17 How 183, 194, 15 L. Ed. 208, 212; Bliven v. New England Screw Co., 23 How 420, 432, 16 L. Ed. 510, 513; Russell v. Ely, 2 Black, 575, 17 L. Ed. 258; Sweeney v. Easter, 1 Wall 166, 173, 17 L. Ed. 681, 684; Bischoff v. Wethered, 9 Wall 812, 816, 19 L. Ed. 829, 831; Dillon v. Barnard, 21 Wall 430, 437, 22 L. Ed. 673, 676; Dows v. National Exch. Bank, 91 U. S. 618, 634, 23 L. Ed. 214, 219; Lilienthal's Tobacco v. United States, 97 U. S. 237, 24 L. Ed. 901; Swift & Co. v. Hocking Valley R.*

Co., 243 U. S. 281, 288, 37 S. Ct. 287, 61 L. Ed 722, 725. As is stated in the *Dows* case, supra, the submission of a question like the second interrogatory submitted by the District Court in this case is "an invitation to find a fact of which there was no evidence."

The decisions below are likewise in conflict with applicable decisions of the courts of the State of Texas. *Pritchard v. Burnsides, Tex. Civ. App., 1942, 158 S. W. 2d 586, affd., 140 Tex. 212, 167 S. W. 2d 159 (1943); Haley v. Murray, Tex. Civ. App., 1944, 177 S. W. 2d 333, p. 338, writ refused, want of merit; Turner v. Montgomery, Tex. Com. App., 1927, 293 S. W. 815, affirming Tex. Civ. App., 1926, 286 S. W. 624.*

That this is a rule of generally accepted and usual judicial procedure is illustrated further by *17 Corpus Juris Secundum, Contracts, Section 617, pp. 1284-1288.*

The departure from accepted judicial procedure went to its greatest extreme in this case when the Court of Appeals held (by way of summary footnote, R. 452) that failure on the First Special Interrogatory precluded Petitioner's argument with respect to the Second Interrogatory. The second question, although growing out of the same transaction as the first question, clearly was susceptible of an answer independent of the first question. The holding of the Court of Appeals is comparable to saying that an Appellant who fails in his attack, in an ordinary tort case, with respect to a finding of negligence is likewise

precluded from attacking a finding with respect to a causation or damages.

CONCLUSION

Fundamental stability in the procedures of the Courts of the United States, both District Courts and Appellate Courts, lends great weight to the respect that the United States court system enjoys. Conversely, fundamental departures from the usual and accepted course of judicial proceeding necessarily results in substantial discredit to the judicial process, and improper decisions and injustice to the parties may follow. Petitioner respectfully submits that this has been the result in this case and, for these reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

Of Counsel:

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ROBERT M. MARTIN, JR.,
Republic National Bank Building (27th Floor),
Dallas, Texas.

APPENDIX A

EVANS PRODUCTION CORPORATION

1932 OLIVER BUILDING

PITTSBURGH 22, PA

May 28, 1953

Mr. Don J. Shaw
4516 Versailles Street
Dallas, Texas

Dear Mr. Shaw:

To enable you to obtain a proprietary interest in the affairs of Evans Production Corporation, the Company has assisted you in financing the purchase of 483 shares of Common Stock without par value - stated value $50.00 per share of Evans Production Corporation Common Stock (hereinafter referred to as "stock") at its book value March 31, 1953 or $106.25 per share. As security for this advance, you have given us your note (hereinafter referred to as "note") together with the 483 shares of "stock", (with stock assignment form or forms duly executed) so purchased by you, as collateral security for this advance.

As an incentive for you to work for the best interests of Evans Production Corporation and to assist you in your realization of the results of such efforts, the Company agrees that;

(1) After you have owned the aforesaid "stock" and have been in the continuous employ of the Company for a period of two years from this date, upon your one and only written request to be made at any time between May 28, 1955 and within ten days after May 28, 1958, the Company will purchase all of said "stock" at its book value as shown by the Company's annual statement for the year ending March 31 last preceding the date of your request, plus a value of $.50 a barrel for proven oil reserves of the Company.

(2). The Company has, at its own expense, taken out a five year $50,000.00 convertible and renewable term life insurance policy upon your life. The beneficiary of the policy is Evans Production Corporation and in the event of your death during the original five year term of this policy and provided your death occurs while in the employ of the Company, the Company will apply the insurance proceeds and other money if necessary to purchase the aforementioned stock at its book value as shown by the Company's annual statement for the year ended March 31, preceding your death, plus a value of $.50 a barrel for proven oil reserves of the Company, provided the properly authorized executor or administrator of your estate, within 60 days after your death, makes a written request of the Company to purchase said stock.

(3) If at any time, prior to two years from the date of this letter, there is an unpaid balance on the note and you leave the employ of the Company or desire to secure a refund of the monies paid on account of the note, the Company will upon your written request refund without interest all payments made upon the principal of the note and look only to the collateral pledged under the note for payment of the note which note automatically becomes due and payable.

You agree that after or simultaneously with the Company's purchase of said stock at your request or the refund of any monies that this letter will be surrendered to the Company and that there shall be no waivers of any of the provisions or conditions of this letter for any reason whatsoever.

Your signed acceptance of one copy of this letter will constitute acknowledgment that this letter is given voluntarily by the Company and is the entire agreement between the Company and yourself and pertains only to the specific 483 shares of "stock" aforementioned.

Yours very truly,

President

ACCEPTED:

Don J. Shaw

APPENDIX B

"Special Instruction No. 1:

"You are hereby instructed that in determining the agreement and understanding between the parties you should consider the construction or interpretation placed upon the agreement and understanding by the parties themselves.

"Special Instruction No. 2:

"You are hereby instructed that in determining the agreement and understanding between the parties you should consider the subject matter of the agreement and the purpose or purposes sought to be accomplished thereby.

"Special Instruction No. 3:

"You are hereby instructed that in determining the agreement and understanding between the parties you should give effect to a reasonable, as contrasted to an unreasonable interpretation of the agreement and understanding.

"Special Instruction No. 4:

"You are hereby instructed that in determining the agreement and understanding between the parties you should consider the surrounding circumstances existing at the time the contract or agreement was entered into by the parties.

"Special Instruction No. 5:

"You are hereby instructed that in determining the agreement and understanding between the parties that you should consider any written agreement in its entirety and not just one particular phrase or portion of such written agreement."

APPENDIX C

RULE 46. EXCEPTIONS UNNECESSARY.

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

RULE 51. INSTRUCTIONS TO JURY: OBJECTION.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

APPENDIX D(1)

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17931

EVANS PRODUCTION CORPORATION,
Appellant and Cross-Appellee,

versus

DON J. SHAW,
Appellee and Cross-Appellant.

Appeal and Cross-Appeal From the United States District Court for the Northern District of Texas.

(March 30, 1960)

Before RIVES, Chief Judge, and JONES and BROWN, Circuit Judges.

RIVES, Chief Judge: This action was commenced by Don J. Shaw against the Evans Production Company and was based upon a letter agreement between the parties

dated May 28, 1953. The agreement in question, which is set out in full in the margin,[1] provided for the purchase by Shaw of 483 shares of common stock in Evans with the

[1] "Evans Production Corporation
"1932 Oliver Building
"Pittsburgh 22, Pa.

"May 28, 1953

"Mr. Don J. Shaw,
"4516 Versailles Street,
"Dallas, Texas,

"Dear Mr. Shaw:

"To enable you to obtain a proprietary interest in the affairs of Evans Production Corporation, the Company has assisted you in financing the purchase of 483 shares of Common Stock without par value—stated value $50.00 per share of Evans Production Corporation Common Stock (hereinafter referred to as 'stock') at its book value March 31, 1953 or $106.25 per share. As security for this advance, you have given us your note (hereinafter referred to as 'note') together with the 483 shares of 'stock,' (with stock assignment form or forms duly executed) so purchased by you, as collateral security for this advance.

"As an incentive for you to work for the best interest of Evans Production Corporation and to assist you in your realization of the results of such efforts, the Company agrees that;

"(1) After you have owned the aforesaid 'stock' and have been in the continuous employ of the Company for a period of two years from this date, upon your one and only written request to be made at any time between May 28, 1955 and within ten days after May 28, 1958, the Company will purchase all of said 'stock' at its book value as shown by the Company's annual statement for the year ending March 31, last preceding the date of your request, plus a value of $.50 a barrel for proven oil reserves of the Company.

"(2) The Company has, at its own expense, taken out a five year $50,000.00 convertible and renewable term life insurance policy upon your life. The beneficiary of the policy is Evans Production Corporation and in the event of your death during the original five-year term of this policy and provided your death occurs while in the employ of the Company, the Company will apply the insurance proceeds and other money if necessary to purchase the aforementioned stock at its book value as shown by the Company's annual statement for the year ended March 31, preceding your death, plus a value of $.50 a barrel for proven oil reserves of the Company, provided the properly authorized executor or administrator of your estate, within 60 days after your death, makes a written request of the Company to purchase said stock.

"(3) If at any time, prior to two years from the date of this letter, there is an unpaid balance on the note and you leave the employ of the Company or desire to secure a refund of the monies paid on account of the note, the Company will upon your written request refund without interest all payments made upon the principal of the note and look only to the collateral pledged under the note for payment of the note which note automatically becomes due and payable.

"You agree that after or simultaneously with the Company's purchase of said stock at your request or the refund of any monies that this letter will be surrendered to the Company and that there shall be no waivers of

right to re-sell this stock to Evans at a subsequent date.[2] The price to be paid by Shaw in the original purchase was specified in the agreement at $106.25 per share, thus making the total original purchase price $51,318.75 for the 483 shares. The price to be paid by Evans for the return of the shares in the event Shaw elected to exercise his option to re-sell was not specified with this same exactitude. Rather, the agreement attempted to set up a method by which that price could be ascertained by reference to the financial condition of the company at the time of the election.

Shaw bought the stock as contemplated by the agreement and, by letter dated January 22, 1957,[3] attempted to exercise his right to re-sell. A controversy ensued as to the price which, under the agreement, Evans was obligated to pay for the shares. This controversy was never resolved and eventually resulted in this litigation. The controversy revolves about the interpretation to be given to the following language of the agreement:

> "* * * the Company will purchase all of said 'stock' at its book value as shown by the Company's annual statement for the year ending March 31 last preceding

any of the provisions or conditions of this letter for any reason whatsoever.

"Your signed acceptance of one copy of this letter will constitute acknowledgement that this letter is given voluntarily by the Company and is the entire agreement between the Company and yourself and pertains only to the specific 483 shares of 'stock' aforementioned.

"Yours very truly,

"T. M. EVANS, President.

"Accepted:

"DON J. SHAW."

[2]The agreement limited the period during which Shaw could exercise this right to re-sell to a period beginning May 28, 1955, and ending within ten days after May 28, 1958.

[3]Which date was within the limitation described in note 2, supra.

the date of your request, plus a value of $.50 a barrel for proven oil reserves of the Company."

Shaw took the position that this provision bound Evans to re-purchase the stock at a price to be determined by adding to the book value of the stock fifty cents for each barrel of proven oil reserves belonging to Evans as of January 22, 1957, when he chose to exercise his option to re-sell. Since the proven oil reserves on that date totaled 611,384 barrels, Shaw's position was that the proper re-purchase price for his 483 shares was $452,596.03. Evans, on the other hand, took the position that the re-purchase price was to be calculated by first adding fifty cents a barrel for proven oil reserves to the assets of the company as reflected in its annual statement of the March 31 preceding Shaw's election, and, then determining the book value of the 483 shares. Since there were 9667 shares of stock outstanding, this method of calculation produced a price of $81,676.75.

The real gist of the argument, therefore, has been whether Shaw is entitled to the full fifty cents for each barrel of proven oil reserves, as would be the case under his interpretation of the agreement, or is entitled to only 483/9667 of fifty cents for each barrel of proven oil reserves, which would follow from Evans' interpretation.

The district court held that the agreement itself was ambiguous and, consequently, permitted the introduction of extrinsic evidence relating to the circumstances surrounding the execution of the agreement. The case was then submitted to the jury under two special issues, both

of which were answered favorably to Shaw.[4] Evans' motions for judgment notwithstanding the verdict and for a new trial were denied and judgment was entered in favor of Shaw in the amount of $452,596.03. In doing so, the district court rejected Shaw's requests for interest from the date he attempted to re-sell the stock to Evans and for attorneys' fees. Evans appealed from the adverse judgment on the merits. Shaw appealed from the judgment insofar as it denied his request for interest.

Evans' attack on the judgment is three-pronged: first, that the district court erred in holding that the agreement was ambiguous; secondly, that assuming the agreement to be ambiguous, the extrinsic evidence clearly showed that the proper interpretation of the agreement was that advanced by Evans; and, finally, that the district court adopted an entirely erroneous procedure in the submission of the case to the jury. These three contentions will be separately considered.

[4] "Special Issue No. 1: Was it the agreement and understanding between Evans Production Corporation and Don J. Shaw that Evans was to repurchase from Shaw 483 shares in Evans Production Corporation for the book value thereof plus 50¢ per barrel on 483/9667 of the proven oil reserves of Evans Production Corporation, or was such agreement and understanding that Shaw was to receive said book value, plus 50¢ per barrel for 100% of the proven oil reserves of Evans Production Corporation?

"Answer: The book value plus 50¢ per barrel on 483/9667 of the proven oil reserves or

"The book value plus 50¢ per barrel for 100% of the proven oil reserves.

"Answer: The book value plus 50¢ per barrel for 100% of the proven oil reserves.

"Special Issue No. 2: Was it the agreement and understanding of the parties that the determination of the amount of oil reserves was to be made as of January 22, 1957 or March 31, 1956?

"Answer: March 31, 1956 or January 22, 1957.

"Answer: January 22, 1957."

Upon a consideration of the entire agreement, we conclude that Evans' first contention, i.e., that the language of the agreement unambiguously supports its interpretation, must fail. Indeed, considered alone, the language of the provision for determining price in the event of an election to re-sell (quoted above) might be viewed as unambiguously *contra* to Evans' interpretation. Evans seeks to have us read the word "plus" in that provision as equivalent to "adjusted by adding," even though it has failed to show us a single instance in which that word was given such a meaning. Such a novel interpretation would be wholly unjustified,[5] unless required when the re-purchase provision is considered in the context of the whole agreement.[6]

In support of its contention that such an interpretation is required, Evans points to two other aspects of the agreement. First, the recital at the outset of the agreement that its purpose was "to enable you [Shaw] to obtain a proprietary interest in the affairs of Evans Production Company" is stressed. Assuming for the moment that this recital is inconsistent with Shaw's interpretation of the agreement, the argument is nevertheless unavailing. For, it ignores

[5] This conclusion, reached entirely upon the basis of the words used in re-purchase provision, is reinforced when attention is directed to the punctuation of that provision. For, even if Evans succeeded in establishing its contention that "plus" could mean "adjusted by adding," the presence of the comma immediately preceding "plus" would tend to indicate that such was not its meaning in this particular context.

[6] We do not view the use of the word "value," instead of the word "sum," in referring to the fifty cents for each barrel of proven oil reserves as of any particular significance. We agree with Evans that "value" was probably chosen because the fifty cents was to be added to a figure already referred to as "book value." But the essential question is when this addition was to take place. And, on this crucial point, the use of the word "value" is unilluminating.

the further recital that the stock arrangement was designed "as an incentive for you [Shaw] to work for the best interests of Evans Production Corporation and to assist you in your realization of the results of such efforts." That this second recital is entirely consistent with Shaw's interpretation of the agreement is obvious. Thus, Evans' argument on this point would fail even if the asserted inconsistency with the first recital existed.[1] It is apparent, however, that no such inconsistency does exist. Quite clearly, the agreement was designed to give Shaw a proprietary interest in the company. The essential question is not the nature of Shaw's interest but, rather the extent of it.

Evans' next contention is that when clause (1) of the agreement (the re-purchase provision) is read in the light of clause (2), it is apparent that the interpretation it urges is correct. Clause (2) recites that Evans has taken out a policy of insurance upon Shaw's life in the amount of $50,000 and binds Evans to re-purchase the stock, if requested to do so by Shaw's executor or administrator, out of "the insurance proceeds and other money if necessary." Evans argues that the use of the words "if necessary" precludes Shaw's interpretation for, under that interpretation, "other money" would inevitably be necessary. We deem it sufficient to say that we find that argument in-

[1] This follows from the fact that the two recitals are, for present purposes, at least alternative. Indeed, an argument could be made that since the second recital immediately precedes the re-purchase provision, it is the more important of the two in the interpretation of that provision.

conclusive.[8] Finally, Evans argues that clause (2) renders Shaw's interpretation incredible for under that interpretation, Shaw's stock would have been worth approximately $200,000 if he had died the very day he signed the agreement, with the result that Evans would have assumed a $150,000 risk on insurance of only $50,000. Again we find the argument unconvincing. Variations between the value of objects insured and the amount of insurance carried thereon are the rule rather than the exception. This Court certainly cannot measure Shaw's interest by Evans' insurance.[9]

We conclude, therefore, that the district court was correct in ruling that the agreement did not unambiguously support Evans' interpretation.[10] The admission of extrinsic evidence to aid in the interpretation of the agreement was thus not injurious to Evans.

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[8] We may point out that the argument, as presented, is an overstatement. "Other money" would not *inevitably* be necessary under either interpretation. The difference is actually only one of probabilities, with there being a stronger probability of need for "other money" under Shaw's interpretation.

[9] Cf. In re United States Commission to Appraise Washington Market Co. Property, 1924, D. C. Cir., 295 Fed. 950, 954, where the opinion correctly observes:

> "The amount of insurance which an owner places upon a given piece of property is little or no index of its value. One may feel impelled to carry a much larger percentage of risk than another. The amount of insurance may depend upon the character of the property insured. The probability of destruction by fire is much greater in a frame building, for example, than in a brick building, and, though the buildings are of equal value, the amount of insurance carried in the one case might be very much larger than in the other. Hence the mere fact that a building is insured for a certain amount is not necessarily an index of its value."

The fact that Evans' risk here may have been under-insured may reflect no more than its belief that Shaw, a young man whose health, so far as appears, was excellent, would not die in the immediate future.

[10] Shaw did not contend that the agreement unambiguously supports his interpretation, so that question is not before this Court.

There was a sharp conflict in the evidence presented to support each of the opposing contentions. Evans attempted, for example, to show that Shaw was quite adequately compensated by his salary and, to this end, introduced considerable testimony tending to minimize the importance and value of Shaw's services to the company. Shaw, on the other hand, attempted to show that, considering his salary alone, he was grossly underpaid for services which his witnesses characterized as highly valuable. The verdict of the jury, of course, resolved this controversy in favor of Shaw. We must, therefore, assume that Shaw was an extremely important employee whose services were worth the price called for by his interpretation of the agreement.[11] It is in the light of this now settled fact that the evidence relating to the negotiations which led up to the execution of the agreement here in question must be considered.

No really serious conflict as to the basic facts of the negotiations appears. It is undisputed that Shaw wanted a so-called "¼ carried interest" in the reserves of the company. It is equally undisputed that Evans was reluctant to, and, indeed, finally refused to, give him such an interest. Evans argues that this one fact precludes Shaw's interpretation for that interpretation operates to give Shaw an interest even greater than the ¼ carried interest

[11] The jury might well have believed that Shaw was almost single-handedly responsible for the success of an enterprise which netted Evans several millions of dollars and, if so, the conclusion that his services were worth roughly one-half million dollars is certainly not unreasonable.

which he was refused. Here again, however, we are compelled to reject Evans' argument.

The interest contended for here by Shaw is, at most, roughly equal to a 1/4 carried interest.[12] And it clearly appears from the testimony of Evans' president himself that the demand for 1/4 carried interest was refused, not because such an interest would give Shaw too great a financial reward, but because Evans' president felt that the interests of the company would be better served if Shaw did not have that *kind* of interest.[13] We therefore conclude that the extrinsic evidence adduced did raise a question of fact for the jury and the district court was

[12] It is not clear, either from the records or the briefs in this case, just exactly what a "1/4 carried interest" amounts to. Shaw contends that such an interest would entitle him to 1/4 of all oil produced by the Company. If so, such an interest would be worth approximately seventy cents for each barrel of oil produced since the evidence showed that the market value of oil was $3.00 per barrel at the time of Shaw's election to re-sell. Evans, on the other hand, attempts to relate the so-called "1/4 carried interest" to the value of the oil in the ground. Since the evidence shows that, at this stage, the value of the oil was only $1.35, Evans contends that a 1/4 carried interest would have been worth only about thirty-four cents per barrel. We find it unnecessary to resolve this conflict in view of the fact that both of these figures are close enough to fifty cents per barrel when considered in the light of the tax consequences of each. See n. 13, infra.

[13] Thus, T. M. Evans, the company president, testified as follows:

"Q. And you were very definite that you did not want him to have that character of interest?

"A. It wasn't I didn't want him to have it; but I didn't think he could operate in the company's best interests if he had an interest different from the Company's. After all, if the Company or I were paying for the drilling, it would be to his advantage to drill a well anywhere, because it wouldn't cost him anything. You might find oil outside of this Courthouse. I wanted to try to avoid that and not get so many dry holes."

In this connection, Shaw also points out the different tax consequences which follow from a "1/4 carried interest" and the fifty cents per barrel formula used in the agreement. A "1/4 carried interest" would give the owner thereof an interest in the oil itself sufficient to entitle him to the tax depletion allowance, whereas the fifty cents per barrel arrangement actually agreed upon leaves the depletion allowance for the entire value of the oil with Evans.

correct in refusing to grant Evans' motions for a directed verdict and for judgment notwithstanding the verdict.[14]

Evans' third and last contention is that the district court submitted the case to the jury under an erroneous procedure. We find this contention wholly without merit. The procedure adopted was that of instructing the jury as to the law governing the case and then submitting to it the ultimate issue as to the proper interpretation of the contract. Such a procedure has long been sanctioned as appropriate where the extrinsic evidence presents a question of fact.[15] *Jackson v. King*,[16] was reversed, not because of the procedure adopted, but because the instructions given were inadequate. Here, Evans has failed to preserve any objections to the district court's instructions. See *Maryland Casualty Co. v. Reid, 5 Cir., 1935, 76 F. 2d 30, 33.* Without passing upon the adequacy of the instructions given in this case had those instructions been given in the face of proper objection, we hold that they were not so grossly inadequate as to warrant reversal in the absence of such objection.

[14] At this juncture, we can dispose of one other, relatively minor, point presented by Evans' appeal. That point involves the question of whether the agreement contemplated the determination of the amount of proven oil reserves as of the date of an election to re-sell, or as of the date of the last annual statement immediately preceding that election. In our view, Evans' position on this point, i.e., that the appropriate date is that of the last annual statement, is inextricably tied to its position on the primary question of interpretation, and its failure there precludes it on this point. The question was submitted to the jury as Special Issue No. 2 and the jury's answer is determinative.

[15] See Feldmann v. Connecticut Mutual Life Ins. Co., 5 Cir., 1944, 142 F. 2d 628, 634; Vernon v. Union Oil Company of California, 5 Cir., 1959, 270 F. 2d 441, 447 at n. 9.

[16] 5 Cir., 1955, 223 F. 2d 714, 718.

We conclude, therefore, that the case must be affirmed insofar as Evans' appeal is concerned. There remains only the question of whether the district court should have allowed interest from January 22, 1957, as contended by Shaw in his appeal.

Under the law of Texas, which both parties concede to be controlling on this issue, it is well settled that interest is collectible "as a matter of law if the amount of recovery, whether under a contract or for a tort, depends on conditions existing at the due date, though unascertained and disputed till the time of the trial."[17] Since the measure of recovery in this case, i.e., the book value of the stock plus fifty cents per barrel of proven oil reserves, clearly depended on conditions existing on January 22, 1957, the allowance of interest from that date was mandatory unless the case was removed from the operation of this general rule by the existence of special circumstances.

Evans contends that it was so removed. This contention is based on the fact that Shaw's original demand upon Evans to re-purchase the stock was predicated upon the theory that there were 950,000 barrels of proven oil reserves, whereas, in fact, there were only 775,353 barrels of such reserves at the time. On the basis of this fact, Evans attempts to rely on the decision of the Texas Supreme Court in *Ingham v. Harrison*,[18] where it was held that where the failure to pay on the due date is due to the fault

[17] City of Texarkana v. Arkansas Louisiana Gas Co., 5 Cir., 1941, 118 F. 2d 289, 294. This rule, recognized by this Court as the law of Texas at that time, has since been reaffirmed by the Supreme Court of Texas in Texas Company v. State, 1955, 154 Tex. 494, 481 S. W. 2d 83.

[18] 1949, 148 Tex. 380, 224 S. W. 2d 1019.

of the plaintiff in insisting upon unjust claims, interest is not recoverable. In our view, this case is not controlling. For here, the failure to pay cannot, in any proper sense, be attributed to the insistence of Shaw upon unjust claims. He put forth 950,000 barrels as his good faith estimate of the amount of proven oil reserves. Evans then refused to counter this estimate with an estimate of its own, and contended, rather that Shaw had misconstrued the agreement. Indeed, the fact that disagreement as to the amount of the proven oil reserves was not the cause of the refusal to pay is clearly shown by the fact that, even though the parties were eventually able to enter a stipulation as to the amount of these reserves, the refusal to pay and this litigation persisted. The exception to the general rule laid down in the *Ingham* case is thus not available to Evans. There being no other theory upon which the operation of this rule is sought to be avoided, we hold that it must apply. The district court was in error in denying Shaw's request for interest from January 22, 1957. The judgment must be modified to grant that request, and it is so

MODIFIED AND AFFIRMED.

APPENDIX D(2)

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17931

EVANS PRODUCTION CORPORATION,
Appellant and Cross-Appellee,

versus

DON J. SHAW,
Appellee and Cross-Appellant.

Appeal and Cross-Appeal From the United States District Court for the Northern District of Texas.

(May 20, 1960).

ON PETITION FOR REHEARING

Before RIVES, Chief Judge, and JONES and BROWN, Circuit Judges.

PER CURIAM: On petition for rehearing, the appellant has attacked the opinion in this case as both factually and

legally erroneous. The first factual error adverted to is that Shaw was the only witness to testify as to the value of his services whereas the opinion refers to "his witnesses," implying that were were others. Secondly, the statement in note 11 of the opinion to the effect that the Evans' enterprise had profited several millions of dollars from its operations is said to be wrong. Upon re-examination, we conclude that both of these factual criticisms are well taken. At the same time, however, we not regard either of these facts as crucial. The legal principles relied upon remain applicable to the case and require that the petition for rehearing be, and it is

DENIED.

The undersigned, of counsel for Petitioner, certifies that the foregoing has been deposited in the United States mail with first class postage prepaid addressed to Turner, Rodgers, Winn, Scurlock & Terry and Frank J. Scurlock, 2400 Republic National Bank Building, Dallas 1, Texas, Attorneys for Respondent.

Of Counsel